

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JASON HULL,

Plaintiff,

v.

IVEY IMAGING LLC, a Washington
limited liability corporation,

Defendant.

No. CV-08-744-HU

FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Jason Hull brings this employment action against his
former employer defendant Ivey Imaging, LLC. Defendant moves to

1 - FINDINGS & RECOMMENDATION

1 dismiss plaintiff's second claim for relief. I recommend that the
2 motion be granted.

3 BACKGROUND

4 The facts are taken from the Amended Complaint. Plaintiff
5 began working for defendant in May 2003. Am. Compl. at ¶ 6. On
6 March 28, 2008, plaintiff was asked to work a shift on Sunday,
7 March 30, 2008. Id. at ¶ 7. Plaintiff requested that defendant
8 make a manager present during the shift because plaintiff
9 anticipated the presence of a co-worker with a known history of
10 threatening and/or violent behavior at work which posed or would
11 likely create a safety risk. Id.

12 On March 30, 2008, while working in the absence of a manager
13 and in the presence of the co-worker with a violent history,
14 plaintiff was confronted by the co-worker in a threatening manner
15 and/or presented with a potentially violent situation. Id. at ¶ 8.
16 Plaintiff opposed and/or reported what he in good faith believed
17 were unsafe working conditions. Id. He informed his supervisor by
18 phone that he no longer felt safe at work and was sent home. Id.

19 On Monday, March 31, 2008, plaintiff reported the working
20 conditions created by the co-worker on March 30, 2008, to defendant
21 and requested that defendant take remedial steps to resolve the
22 situation. Id. at ¶ 9. On April 2, 2008, plaintiff made a formal
23 complaint about the unsafe working conditions to which he had been
24 subjected by the previously threatening/violent co-worker in an
25 attempt to have the situation resolved. Id. Plaintiff was
26 discharged on that date. Id. at ¶ 6.

27 STANDARDS

28 On a motion to dismiss, the court must review the sufficiency

1 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
2 All allegations of material fact are taken as true and construed in
3 the light most favorable to the nonmoving party. American Family
4 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120
5 (9th Cir. 2002).

6 DISCUSSION

7 Based on the above-recited allegations, plaintiff brings two
8 claims: a statutory claim under Oregon Revised Statute § (O.R.S.)
9 654.062, and a state common law wrongful discharge claim..
10 Defendant removed the case to federal court based on diversity
11 jurisdiction.

12 Defendant moves to dismiss the wrongful discharge claim on the
13 basis that the statutory claim offers adequate remedies and thus
14 precludes the wrongful discharge claim. I agree with defendant.

15 The parties generally agree that under Oregon law, the tort of
16 wrongful discharge is an interstitial tort that is available when
17 an employee is discharged in violation of public policy and
18 existing remedies would not fully vindicate the public interest.
19 E.g., Dunwoody v. Handskill Corp., 185 Or. App. 605, 613, 60 P.3d
20 1135, 1138 (2003) ("wrongful discharge is an interstitial tort,
21 designed to fill a gap where a discharge in violation of public
22 policy would otherwise not be adequately remedied.").

23 As I explained in a 2006 Findings & Recommendation, I adopt
24 the preclusion analysis articulated by Judge Stewart in Draper v.
25 Astoria Sch. Dist. No. 1C, 995 F. Supp. 1122, 1127 (D. Or. 1998),
26 abrogated in part on other grounds, Rabkin v. Oregon Health Sci.
27 Univ., 350 F.3d 967 (9th Cir. 2003), and reaffirmed by Judge
28 Stewart in Cantley v. DSMF, Inc., 422 F. Supp. 2d 1214, 1222 (D.

Or. 2006), for determining whether a statutory claim precludes state common law wrongful discharge claim. Henry v. Portland Dev. Comm'n, No. CV-06-712-HU, 2006 WL 4008709, at *4-5 (D. Or. Oct. 18, 2006), adopted by Judge Mosman (D. Or. Jan. 26, 2007). Under Draper,

a claim for common law wrongful discharge is not available in Oregon if (1) an existing remedy adequately protects the public interest in question, or (2) the legislature has intentionally abrogated the common law remedies by establishing an exclusive remedy (regardless of whether the courts perceive that remedy to be adequate).

Draper, 995 F. Supp. at 1130-31.

O.R.S. 654.062 provides, in pertinent part:

(5) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because the employee or prospective employee has:

(a) Opposed any practice forbidden by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780;

(b) Made any complaint or instituted or caused to be instituted any proceeding under or related to ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780, or has testified or is about to testify in any such proceeding; or

(c) Exercised on behalf of the employee, prospective employee or others any right afforded by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780.

O.R.S. 654.062(5).

Many remedies are available when a violation of O.R.S. 654.062(5) has been established. First, O.R.S. 654.062(6)(d) provides that the court may "order all appropriate relief."

Second, by virtue of O.R.S. 654.062(6)(a), the remedies provided for a claim under O.R.S. 659A.030(1)(f) are available for violations of O.R.S. 654.062(5). As a result, a plaintiff who

1 brings a successful claim under O.R.S. 654.062(5) is entitled to
2 file a civil action in court and may be awarded injunctive relief,
3 other equitable relief that may be appropriate, including
4 reinstatement and back pay, and attorney's fees and costs. See
5 O.R.S. 659A.885(1). Additionally, the plaintiff is entitled to
6 compensatory and punitive damages, and a jury trial. See O.R.S.
7 659A.885(3).

8 Defendant argues that because plaintiff, if successful on his
9 statutory claim, is entitled to a full and adequate range of
10 statutory remedies, the wrongful discharge claim is precluded.

11 In response, plaintiff contends that his wrongful discharge
12 claim arises partly out of conduct not protected by O.R.S. 654.062,
13 and that O.R.S. 654.062 contains no language indicating the
14 legislature's intent to negate a plaintiff's common law remedies.
15 I reject both of these arguments.

16 Plaintiff concedes that he made good faith reports of unsafe
17 work conditions to defendant and that this conduct is protected by
18 O.R.S. 654.062. However, he also alleges that his discharge was
19 motivated by his March 28, 2008 conduct in requesting that
20 defendant have a manager present during his March 30, 2008 shift
21 because plaintiff anticipated an unsafe working condition caused by
22 the presence of the co-worker, and his March 31, 2008 conduct in
23 requesting that defendant take remedial steps to prevent him from
24 being subjected to such unsafe work conditions in the future.
25 Plaintiff maintains that termination for these reasons is not
26 protected under O.R.S. 654.062 because they do not constitute a
27 report of, or opposition to, an unsafe work condition. In other
28 words, plaintiff suggests that informing defendant of the

1 possibility of an unsafe work condition before its actual
2 occurrence, and requesting defendant to take preventive measures to
3 prevent such future occurrence, are not notification to defendant
4 of a safety violation presently existing in the workplace.

5 I disagree. When plaintiff requested a manager be present on
6 March 30, 2008, he did so because, as he alleges in the Amended
7 Complaint, he viewed the presence of the co-worker as an unsafe
8 working condition. Am. Comp. at ¶ 7 ("Plaintiff requested
9 Defendant have a manager present during the shift because the
10 anticipated presence of a coworker with a known history of
11 threatening and/or violent behavior at work posed or would likely
12 create a safety risk."). On March 31, 2008, his request that
13 "[d]efendant take remedial steps to resolve the situation" was made
14 in the context of reporting the unsafe working conditions created
15 by the co-worker's presence at the workplace on March 30, 2008.
16 Am. Compl. at ¶ 9.

17 The allegations are most readily understood as notifying
18 defendant of an unsafe working condition caused by the co-worker's
19 presence and seeking protection from that condition. Additionally,
20 the request to remedy the situation made at the time of explicit
21 reporting of the situation, is most readily understood as opposing
22 the current situation and asking that the unsafe conditions created
23 by the co-worker be remedied. Accordingly, these actions are
24 protected conduct under O.R.S. 654.062.

25 Ragnone v. Belo Corp., 131 F. Supp. 2d 1189 (D. Or. 2001),
26 relied on by plaintiff, is distinguishable. There, Judge King
27 noted that the plaintiff did not notify defendant of any safety
28 violations he saw in the workplace, but instead, simply refused to

fly when it was unsafe. Id. at 1196. Judge King stated that plaintiff was "making a fine distinction," and concluded that his conduct did not constitute notification of an unsafe working condition because "the decision not to fly is not a safety violation." Id. Here, plaintiff expressly alleges that he informed defendant of an unsafe working condition caused by the coworker. Plaintiff also did not refuse to work and engaged in affirmative conduct amounting to reporting of, or opposition to, an alleged unsafe working condition. Plaintiff's allegations fall within the protection offered by O.R.S. 654.062.

As to plaintiff's second argument, Draper makes clear that the wrongful discharge tort is unavailable if an existing remedy adequately protects the public interest in question, or the legislature has intentionally abrogated the common law remedies by establishing an exclusive remedy. Here, an existing remedy adequately protects the public interest in question. There is no need to address the legislature's intent. See Henry, 2006 WL 4008709, at *6-7 (adhering to Judge Stewart's conclusion in Draper that the test is disjunctive).¹

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¹ As further noted in Henry, "when a statute is silent with respect to the legislature's intent and an explicit statement is absent, the existence of adequate remedies can be seen implicitly to establish exclusivity." Henry, 2006 WL 4008709, at *7 (internal quotation omitted). Thus here, the presence of adequate remedies satisfies both prongs of the disjunctive test.

CONCLUSION

I recommend that defendant's motion to dismiss the second claim for relief (#7) be granted.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due October 7, 2008. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due October 21, 2008, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 22nd day of September, 2008.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge